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TEXT:

Spouse's Period of Eligibility for Dependent's Educational Assistance Allowance - 38 U.S.C. § 1712(b),(d)

QUESTIONS PRESENTED:

a. May a new delimiting period be established for an eligible spouse's use of educational assistance entitlement under chapter 35, United States Code, when the veteran from whom such eligibility is derived ceases to be rated as permanently and totally disabled, but subsequently is again so rated?

b. If the spouse is entitled to a second period of eligibility, based on a subsequent rating decision reinstating the permanence of the veteran's total rating due to his service-connected disorders, are her separate periods of eligibility limited to an aggregate of 10 years under 38 C.F.R. § 21.3046?

COMMENTS:

1. Under the provisions of chapter 35, title 38, United States Code (Survivors' and Dependents' Educational Assistance), the spouse of a living veteran "who has a total disability permanent in nature resulting from a service-connected disability" is eligible to receive an educational assistance allowance for training received pursuant to the provisions of that chapter. 38 U.S.C. § 1701(a)(1)(D). Section 1712(b)(1)(A) of title 38, United States Code, generally provides, with respect to such an eligible spouse, that educational assistance may not be afforded beyond 10 years after the "date on which the Secretary first finds the spouse from whom eligibility is derived has a service-connected total disability permanent in nature." The term "first finds" as used in the foregoing provision is defined by section 1712(d) as meaning:

T he effective date of the rating or date of notification to the veteran from whom eligibility is derived establishing a service-connected total disability permanent in nature whichever is more advantageous to the eligible person.

2. In the case which gave rise to the questions presented, a veteran had been rated by VA on November 23, 1979, as being totally disabled by reason of Individual Unemployability (IU), effective December 1, 1978. 38 C.F.R. §§

3.340(a)(3), 3.343. The rating noted that no future physical examination was being scheduled (17. Future Date Controls, VA Form 21-6796b dated 11-23-79). In accordance with Department procedures described in VA Manual M21-1, section 47.14a.(1), the rating board determined eligibility of the veteran's spouse to Dependents' Educational Assistance (DEA) in the referenced formal rating decision as follows: "BASIC ELIGIBILITY TO BENEFITS UNDER 38 U.S.C. CHAPTER 35 IS ESTABLISHED FROM 12-1-78." No question has been raised concerning the correctness of this decision.

3. As a consequence of the eligibility rating, the veteran's spouse was eligible at that point to receive DEA. However, before she actually applied, VA redetermined the permanency of the veteran's disability and the wife was denied any DEA benefits, as hereafter described.

4. On October 3, 1980, VA issued DVB Circular 21-80-7 mandating a review of all IU ratings of veterans less than 60 years of age. The veteran's case at issue was so reviewed, and, as evidenced by a memorandum rating dated February 6, 1981, VA determined that his service-connected disabilities justified the continuance of the IU rating. However, the rating included a Future Date Control entry for February 1982 for the purpose of scheduling a physical examination of the veteran on or about that date to reevaluate the physical basis for the IU rating. The practical and legal effect of doing so was to remove the previous finding of permanency as to his service-connected disabilities and, thereby, terminate his spouse's DEA eligibility status.

5. Thus, the spouse's chapter 35 eligibility had been established only from December 1978 to February 6, 1981. Accordingly, on or about May 6, 1982, when the veteran's wife first applied for DEA benefits, her claim was denied. She was advised that she was ineligible due to the fact that the veteran's disability, though total, could possibly improve; i.e., permanency did not exist.

6. Thereafter, the veteran's IU rating was continued with periodic follow-up exams scheduled until August 21, 1989, when the rating board expressly found his condition to be permanent.

7. This brings us to the issue raised by the first question presented: May DEA eligibility, once established based on permanent and total (P&T) disability and then terminated upon a subsequent finding that disability is not permanent in nature, be reestablished upon a subsequent finding of permanency?

8. The only statutory provision we can find that suggests a potential restriction on such reestablished eligibility is found in section 1712(b)(1), limiting the DEA eligibility period to 10 years after the date the Secretary "first finds" the veteran has a service-connected total disability permanent in nature. A literal reading of the "first finds" language certainly implies that such a restriction exists. We note, however, that in this context "first finds" is used as a term of art defined by

section 1712(d) as meaning the effective date of the rating establishing P&T disability or the date the veteran is notified of the rating, whichever is more advantageous to the eligible person.

9. Thus, we are left with the interpretive question: which rating establishing permanent and total disability is the section 1712(d) definition referencing--only the initial such rating (i.e., the first in time) or each rating that establishes the disability? For the reasons discussed below, we find it is the latter.

10. When does a rating "establish" P&T disability? Answering this question is clouded by VA rating procedures and forms that do not require that the rating board specifically establish an effective date for "permanency" as is required for finding "total disability." Thus, a rating that does not expressly mention permanency suggests that the finding is either effective on the same date as the finding of individual unemployability or some unspecified date, such as the date of a subsequent rating that does specifically establish permanency.

11. For example, in the case at issue, the rating board's action on August 21, 1989, specifically finds "permanency of the veteran's condition" but does not provide an effective date for that determination. As a result, one could reason that the renewed finding of permanency is automatically effective retroactively to the effective date of the original IU rating (December 1, 1978, in this case since no intervening improvement occurred in the disability warranting the veteran's IU rating"). In other words, the "first finds" date would be the original effective date of P&T disability or notice to the veteran of such rating, as subsequently reconfirmed (i.e., 10 years from the most advantageous of December 1, 1978, or December 5, 1979, in the case at issue).

12. We do not adopt that "relation-back" interpretation, however. In enacting the various "first finds" provisions presently incorporated in section 1712, Congress has consistently demonstrated, by the terms thereof, a beneficent intent: to accord the claimant the full delimiting period within which to use and benefit from the educational opportunities being provided. Surely, Congress did not intend that the "first finds" rule would be applied to limit the otherwise applicable delimiting period to a period so short as to make use of DEA benefits impractical. Yet, if a finding of permanency were effective the date of the original rating, the spouse likely would be denied use of DEA benefits during at least part of the delimiting period where such finding is revoked during the eligibility period and is later restored. This, however, would thwart the very reason for a "first finds" rule--to mitigate circumstances beyond the claimant's control that, absent such a rule, would effectively prevent the beneficiary from having the benefit of a full delimiting period.

13. The term "first finds" first appeared in the DEA program statute when the original DEA program, then limited to children of deceased veterans, was amended in 1964 by Public Law 88-361. The amendment permitted an eligible

child 5 years to use DEA entitlement after the date VA first found the parent to have a P&T service-connected disability.

14. No definition of the term "first finds" was included in the 1964 statute, necessitating that this office issue advisory opinions on April 14, June 4, and September 10, 1965, applying the term to the DEA claims of children. These decisions uniformly held that the date VA "first finds" the parent to be permanently and totally disabled is the date of the rating; thus, giving the child, even if beyond the maximum age to qualify for DEA benefits on such date, a full 5-year period thereafter in which to train. More pertinent for our purposes here than such holdings, which construe statutory language substantially different than that currently in force, are the discussion and reasoning used in the opinions. These are instructive for their common reference to legislative intent to assure that eligible persons have a full 5- year period for using DEA entitlement, as manifested by the enactment of statutory provisions extending the basic eligibility period under various factual circumstances.

15. Subsequently, the DEA program was expanded to include spouses and surviving spouses of veterans, but with different rules provided for determining commencing dates than those established for children. For the former, the eligibility period ran from the date VA first found the veteran had a P&T disability or the date of death of the veteran, whichever last occurred; for children, the period ran from whichever event first occurred.

16. In 1970, however, Public Law 91-219 made the provisions governing commencing dates of DEA eligibility periods uniform (i.e., conformed the dates for children to those applicable to spouses and surviving spouses) and added the current definition of "first finds" found in section 1712(d). The legislative history for the 1970 law describes the two mentioned changes as liberalizing and states that they "will assure the eligible person of a full period of educational eligibility." S. Rep. No. 360, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 2609-10.

17. As can be seen, the above-expressed legislative objective has been consistently pursued throughout the pertinent history of the DEA statute. Plainly, this objective, as well as correcting an inequity between categories of beneficiaries, prompted the Public Law 91-219 amendment making the commencing dates for children consistent with those for spouses and surviving spouses. We perceive, however, that such remedied circumstances actually were far less severe than loom in the instant matter.

18. In the former case, the child's eligibility period, prior to the 1970 amendment, ran from the effective date of the veteran's P&T disability rating. If that date were significantly in the past, the child's eligibility period could be substantially reduced by the resultant retroactive DEA commencing date mandated by the statute. Further, if the parent-veteran subsequently died, the child, unlike the

surviving spouse, could not opt for the more advantageous commencing date of eligibility based on the date of the veteran's death.

19. The above-described potential for reduction in a child's eligibility period pales in significance, however, to the potential "forfeiture" of entitlement that would occur in the instant case if the "first finds" rule were read to limit eligibility to the initial brief period when DEA entitlement was established and then discontinued. Concededly, circumstances such as those presented here would not be expected to occur with any frequency. However, they reflect the reality that disabilities initially judged permanent may, with progressive medical knowledge, subsequently be found susceptable of improvement. The Congress certainly was aware of this (see 38 U.S.C. section 1711(d), avoiding interruption of a DEA beneficiary's benefits in the middle of a school term due to the change in eligibility status so effected), and we are not prepared to ascribe to Congress an intent in such circumstances to bar restoration of DEA eligibility when the revised medical judgment that removed the finding of permanency, and, thereby, cut short the initial eligibility period, is not validated by later events.

20. In short, we find no statutory language that expressly bars another eligibility period when the requisite disability establishing DEA entitlement is reestablished, as in the case at issue. Moreover, we note obvious congressional intent to permit the eligible child or spouse the opportunity to use the DEA benefit to the fullest extent possible. Accordingly, we conclude that in the event of more than one rating establishing DEA eligibility in a particular case, the commencing date for eligibility should be determined by applying the term "first finds" to each such rating action rather than only the first such action ever taken. Thus, when a finding of permanency is made, removed and reestablished, the "first finds" rule of section 1712(d) applies to each such finding establishing that the veteran has a permanent and total service-connected disability.

21. In answer to your second question, when a new finding of P&T disability reopens DEA eligibility for a spouse, a new 10-year period of eligibility commences from the date determined pursuant to section 1712(d). We find no statutory basis for deducting from the new period any portion of time during which the spouse may have been eligible upon an earlier P&T disability finding. The statute expressly delimits the chapter 35 eligibility period in terms of a particular period in time (i.e., 10 years from a fixed commencing date) rather than in terms of a maximum amount of time (e.g., a total of 10 years). Thus, the law grants no authority, express or implied, to restrict the delimiting period to a maximum 10-year aggregate of multiple eligibility periods.

HELD:

a. A new delimiting period shall be established for an eligible spouse's use of DEA entitlement when the veteran from whom such eligibility is derived ceases to be rated permanently and totally disabled, but subsequently is again so rated.

b. In the case of multiple periods of eligibility, each such period shall be a full 10 years in duration, without aggregation.

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